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Chaney v. State Bar of California et al No. 1140

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No. 1140

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

Jerry D. Chaney,

Petitioner,

vs.

The State Bar of California, et al

Petition for a Writ of Certiorari to The United States Court of Appeals for the Ninth Circuit

---

Jerry D. Chaney
1800 W. Lincoln Ave., Apt. 227
Anaheim, California 92801

Appearing in Propria Persona

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In the Supreme Court of the United States

October Term, 1967

No. _____

Jerry D. Chaney,

Petitioner,

vs.

The State Bar of California, et al

Respondent.

Petition for a Writ of Certiorari to
The United States Court of Appeals
for the Ninth Circuit

INTRODUCTION

Jerry D. Chaney, your petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on November 21, 1967.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit in the above-entitled case, to the best

of your petitioner's knowledge, is unreported as of this time The full text of the opinion, however, is contained in Appendix I of this petition.

JURISDICTION

The jurisdiction of this court is invoked under 28 USCA 1254 (1).

QUESTIONS PRESENTED

1. Whether the State Bar of California has the right, in the giving of an examination to determine if one meets the minimum standards to practice law, to give an examination which calls for totally subjective grading.

2. Whether any regulatory agency, acting under color of law, can, when regulating in a field that involves a constitutional right, regulate in a manner that is arbitrary.

3. Whether the State Bar of California can, when demanding high standards of applicants for admission to the bar, determine the minimum standard to be that which exists in the subjective opinion of the grader at the time he grades an examination paper.

4. Whether the State Bar of California can, in determining who meets

minimum requirements for admittance to the bar, give an examination which has no useful or practical effect other than that it enables the State Bar to limit the number of persons gaining admittance to the bar.

5. Whether the petitioner suffered a deprivation under 42 USC 1983.

6. Whether the plaintiff should have first exhausted his state remedy, if any, before seeking relief under 42 USC 1983.

7. Whether the applicant states a cause of action in his complaint.

8. Whether the State Bar of California is a person within the meaning of 42 USC 1983.

9. Whether the board of governors and/or the committee of bar examiners of the State Bar of California are immune from suit under 42 USC 1983.

10. Whether an effective decree granting the injunctive relief sought by the petitioner in this action could be framed.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitutional Provisions

The 14th Amendment of the United States Constitution provides in pertinent part as follows:

> "Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Federal Statutes

Section 1983 of the United States Code, Title 42, provides as follows:

> "Every person, who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws,

shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

State Statutes

The California Business and Professions Code (hereinafter referred to as the B & P Code) provides in pertinent part as follows:

Section 6001: "The State Bar is a public corporation. It is hereinafter designated the State Bar.
The State Bar has perpetual succession and a seal and it may sue and be sued."

Section 6046: "The Board may establish an examining committee having the power to certify to the Supreme Court for admission those applicants who fulfill the requirements provided in this chapter."

Section 6068, Subsection 2: "The committee shall certify to the Supreme Court for admission to practice law those persons who

fulfill the requirements for admission."

Section 6068, Rule XI, Subsection 111: "Every general applicant shall...take an examination known as the bar examination which shall be conducted either by the committee or under its supervision or pursuant to its direction...."

Section 6068, Rule XI, Subsection 112: "The examination shall be written and shall consist of such questions as the committee may select."

Section 6068, Rule XI, Subsection 113: "The passing grade shall be 70 per cent of the highest possible grade and an applicant who does not receive a passing grade shall not be eligible for certification to the court for admission to practice law."

Section 6125: "No person shall practice law in this state unless he is an active member of the State Bar."

Section 6002: (Taken out of order for effect) "The members of the State Bar are all persons admitted and licensed to practice law in this state...."

STATEMENT OF CASE

Petitioner took the bar examinations given by the State Bar of California in the fall of 1965 and the spring of 1966. He was informed that he did not pass either examination. Petitioner, on May 26, 1966, filed a complaint (labeled petition) in the United States District Court for Southern California, Central Division, alleging the examinations were given in a manner which violated his constitutionally secured right to pursue an occupation. He named as defendants the State Bar of California, and five individuals, John A. Sutro, J. N. De Meo and A. Steven Halsted Jr., members of the board of governors of the State Bar of California, and David B. Heyler, Jr. and Peter J. Crosby Jr., as members of the committee of bar examiners for the State Bar of California, and invoked the court's jurisdiction under 28 USC 1343 and 42 USC 1983 (Civil Rights Act).

The complaint sought general damages in the amount of $40,000. plus $100,000. for injury to reputation and $500,000. in punitive damages. The complaint further prayed for injunctions requiring:

1. That the court direct the defendants to certify him for admission.
2. That the court order the defendants to cease and desist from conducting subjective or arbitrary examinations.
3. That the court order the defendants to refrain from engaging in any scheme or plan which has as one of its purposes the controlling of competition among attorneys.

Defendants moved for dismissal, and the motion was granted June 24, 1966. Petitioner appealed to the United States Court of Appeals for the Ninth Circuit. Judgment of the lower court was affirmed November 21, 1967.

REASONS FOR GRANTING WRIT

I

The decision below conflicts with decisions of this court on important

issues affecting a federal constitutional right.

A

The decision below affirms a United states District Court holding that the complaint raised no constitutional issue of substance. The decision below held that "California (presumably meaning the State Bar) has the right" to give a subjective type examination (see page 3, Appendix I).

In Louisana vs United States, 380, U.S. 145, this court held an identical type situation unconstitutional. In that case, the following four elements were present: (1) A regulating agency (voter registrar), acting under color of state law, was (2) determining who qualified (3) to exercise a constitutionally secured right (the right to vote) by (4) the giving of a subjective type examination. (The examination was called a "reasonable interpretation test" in which the grader determined in his judgment which applicants gave a reasonable interpretation of a section of the United States Constitution.)

The same four elements are present in the instant case, namely: (1) A regulating agency (the State Bar), acting under color of state law, (2) determined whether or not petitioner qualified to (3) exercise a constitutionally secured right (the right to pursue any of the common occupations of life, Meyer vs. Nebraska, 262 U.S. 390, including the practice of law, Schware vs. Board of Examiners, 353 U.S. 232, by (4) giving him a subjective type examination. (He was asked to discuss legal issues to the satisfaction of the grader).

Although petitioner cited Louisiana vs. United States, supra, as authority for his contention, the decision below makes no reference to it and makes no effort to reconcile it with the instant case.

'B

The decision below affirming a United States District Court holding that the complaint stated no constitutional issue of substance is in direct conflict with the holding of this court in Schware vs. Board of Examiners, supra, in which Justice Frankfurter said in a separate opinion:

of the thing he complains of.

The court below apparently did not consider that part of 42 USC 1983 which says: "Every person, who under color of any statute...subjects, or causes to be subjected...." Petitioner contends that refusal of the State Bar to certify an applicant for admission to practice is tantamount to Supreme Court refusal. To support this contention, petitioner did, on January 20, 1968, make a motion to the Supreme Court of California (See Exhibit A) that he be admitted to the practice of law. The court returned the motion, stating that the proper course of action was to seek a review (presumably of petitioner's grades in the bar examinations). The Supreme Court of California has held that it will not substitute its judgment for that of the graders in a review of bar examination papers. Salot vs State Bar, 3 C 2nd 615; Staley vs State Bar, 17 C 2nd 119. Thus, petitioner is completely blocked from practicing law as a result of State Bar action.

Petitioner's motion also appears to satisfy the conditions set forth by the lower court to establish the deprivation

complained of:

> "The significance of this is that...a refusal of certification is not a power of deprivation. Only if the Court expressly or impliedly approves the Committee's refusal to certify so as to make this the basis or allow it to have the effect of denial of admission can the Committee's actions of examination and refusal to certify come to be a fixative status and have the stature of a deprivation." (See Appendix A, page 6)

In summary, petitioner contends the State Bar caused him to be deprived of a federally protected right. Therefore, he is entitled to seek redress in federal district court under 42 USC 1983, whether there is a state remedy or not. Monroe vs Pape, 365 U.S. 167; McNeese vs Board of Examiners, 373 U.S. 668.

II

The court below did not specifically rule on questions six, seven, eight, nine, and ten, supra, all of which defendants have raised in their brief and points and

authorities. Petitioner, in the interest of ending this litigation, respectfully requests this court to rule on these questions. Petitioner believes this court has before it all the arguments and authorities necessary to reach a decision in each of the questions. *

III

THE PUBLIC IMPORTANCE OF THE ISSUES PRESENTED

A

Petitioner believes the question as to whether or not a regulatory agency can assume arbitrary power (the power to act according to one's own will or caprice) is of uppermost importance to our Democracy, for in this question lies the nation's guiding concept - that we shall have a government of laws, rather than of men. The question has added importance because a trend in the direction of arbitrary control by governmental agencies, or agencies acting under color of law, is apparent. Petitioner views this trend with grave concern. Where power is un-

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* Points in answer to opinion of court below are contained in Appendix II

bridled, conduct becomes unbridled. And, beyond this, is the feeling of free men that they do not want to live under the yoke of a ruler. This court stated the same view in Yick Wo vs. Hopkins, 118 U.S. 356:

> "But the fundamental rights of life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, 'the government of the commonwealth may be a government of laws and not of men.' For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where

freedom prevails, as being the essence of slavery itself."

Petitioner hopes that this court will not forget those words and that it will not take a step backwards in civilization by refusing to apply them to this case.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for certiorari should be granted.

_____
Jerry D. Chaney
Petitioner

_____
Date

APPENDIX I

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JERRY D. CHANEY,
Appellant,

vs.

THE STATE BAR OF CALIFORNIA, et al.,
Appellees.

No. 21,402

[November 21, 1967]

Appeal from the United States District Court
for the Central District of California

Before: CHAMBERS, Chief Judge, JOHNSEN* and KOELSCH, Circuit Judges.

JOHNSEN, Senior Circuit Judge.

A law school graduate, not elsewhere admitted to the practice, took the examination required for admission to the California bar and twice failed to pass. He was eligible to take the examination a third time but chose not to do so. Instead, he brought suit under the Civil Rights Act of 1871, 42 U.S.C. §1983, against the State Bar of California, members of its Board of Governors, and members of its Committee of Bar Examiners, in injunction and damages, for not being certified to the Supreme Court of California for admission.

The District Court dismissed the action and we affirm. We do so on the grounds that the alleged wrong upon which the suit is predicated does not involve any issue of constitutional substance; that, even if it had, this would not enable a suit to be maintained in the situation under the Civil Rights Act; and

*Harvey M. Johnsen, Senior Circuit Judge of the Eighth Circuit, sitting by designation.

that it does not otherwise provide basis for any federal claim on which the court could grant relief. It may be observed in this connection that opportunity was accorded appellant to make any amendment or supplement to his complaint that he thought possible, but he stated he had none.

The extent to which federal concern is entitled to exist as to the right to be admitted to the practice of law in a State has been stated by the Supreme Court as follows in *Schware v. Board of Examiners of New Mexico*, 353 U.S. 232, 238-239, 77 S.Ct. 752, 756, 1 L.Ed.2d 796:

> "A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment. • • • A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law. • • • Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory".

Appellant does not purport to claim, within the conditions of *Schware*, that there was no basis for the Committee of Bar Examiners' finding that he failed to pass the examinations taken by him. Nor does he purport to claim that the Committee was without basis to find that those whom it certified to the Supreme Court for admission had passed the examination so as to involve invidiously discriminatory action in this respect against him. His primary attack is a general one upon the form or type of examination regularly employed by the Committee and used by it in the two examinations taken by appellant.

The Committee's examinations have in form consisted of sets of questions covering some 24 subjects of the law, calling for discussion or essay answers and thus requiring exercise and demonstration of analytical and reasoning capacity. It admittedly is the form of examination employed generally in the law schools of the country, and the form suggested for bar-admission use in

the American Bar Association's Recommended Standards for Bar Examiners (1959), as follows: "The major portion of the Bar examination should consist of questions in the form of hypothetical fact problems requiring essay answers."

Within the recognition contained in *Schware* of the right of a State to require high standards of relevant qualification for admission to its bar, and in relation to the condition thereof that any such required qualification must however have "a rational connection with the applicant's fitness or capacity to practice law", we are unable to see any possible federal question in the fact of the use by California of the essay-type examination as such. To us it seems patent on its face that California has the right to allow its Committee of Bar Examiners to use such a type of examination in demonstration by those seeking admission to its bar, as a qualification standard, that they have the capacity to analyze general legal situations and to make application thereto of such general legal knowledge as can be expected to be possessed by the graduates of accredited law schools. The existence of this qualification certainly has a rational connection with the capacity to practice law, for it inherently is the primary basis of general legal service. And of course there also is involved in such an essay examination an indication as to the possession or lack of knowledge in the legal fields to which the questions relate. There can therefore exist no constitutional substance in such theoretical attacks of appellant as that essay-type examinations are fundamentally unfair and improper, because the grading thereof is a matter of subjective evaluation by the examiner so that the marks given can and are likely to turn on how closely the applicant's discussion and solution correspond with the examiner's personal views or legal philosophy; that within the discretionary range which is open to exercise in subjective evaluation, whether motivatedly or unmotivatedly done, there is no possible way that the examiner's grade can be demonstrated to be wrong; and that it therefore should in legal fairness be held that the Committee can have the right only to give examinations of an objective character which are without any margin for discretion in grading—such as questions calling for "yes" or "no" answers, or questions otherwise subject to determination of correctness of answer definitively, like [in example given by appellant] "List the grounds for demurrer in the State of California".

But beyond the theoretical attacks made upon the form or type of examination employed by the Committee (appellant has urged others which are even more legally frivolous), the complaint also makes a general insinuative charge that the California examinations have been used "to control competition". The record shows that in his memorandum in the District Court appellant made the following argument, although this has not been carried into his brief here: "In 30 consecutive bar examinations only 50.7 per cent passed the spring examinations and only 53.5 per cent passed the fall examinations. *State Bar Journal, Vol. 39, 1964, p. 158:* only slightly over 42 per cent passed the March, 1966, examination [the last one taken by appellant]. This is ample evidence that the examinations are actually being used as a device to keep down competition among attorneys".

As is sufficiently implied by our discussion of the attacks made upon the form of examination employed by the Committee, it cannot be held legally that essay-type examinations will from their very nature have operation and effect to unfairly restrict admissions. Appellant's charge that the examinations are being used "to control competition" can therefore only have basis (1) if the Committee has been engaging in dishonest grading to accomplish that end, or (2) if it is giving examinations of such scope or difficulty as to be outside the bounds of the educational prescriptions which the California statute has made the basis for the right to take the examination.

Appellant made it clear in the hearing on appellees' motion to dismiss that he was not intending to assert or rely upon a claim of dishonest grading. Nor could such a general claim, if made, have had any application to his personal situation. As has been stated, he was not contending that he was entitled to certification on the basis of having in fact passed the examination, but on the basis of having been illegally frustrated of a proper opportunity to obtain certification because of the form and nature of the examinations which the Committee was employing.

As to any intended implication that, apart from the alleged unfairness of the form of the examination as such, the Committee was giving examinations of a scope or difficulty beyond the standard of the educational prescriptions which had been made the basis of the right to take the examination, and so was engaging in

unauthorized qualification requirements, the situation is in our opinion without any basis of possible substance on which such a contention legally could be made. In California's right to require high standards of qualification for admission to its bar, as recognized by *Schware,* it would implicitly be entitled to make its bar examinations more comprehensive and difficult than other States might choose to do. Thus, whatever should be the extent of comprehensiveness or difficulty which it saw fit to allow its Committee of Bar Examiners to employ in examination policy, this could not afford basis for any legal challenge, except as the qualification required to pass the examinations could be demonstrated to unarguably be outside the bounds of the educational prescriptions which had been made the basis for the right to take the examination. But unarguable demonstration that such an improper qualification requirement was being engaged in by the Committee could hardly be recognized as legally possible when some 50 per cent of those taking the California examinations have through the years been able to pass them on the basis of the statutory educational prescriptions.

There is also, however, another reason why appellant's grievance at not being certified by the Committee cannot be made the basis of the present action. Under California law, refusal of the Committee to certify an applicant to the Supreme Court is not a terminative or fixative step in his seeking of admission to the bar. Neither the State Bar of California nor its Board of Governors nor its Committee of Bar Examiners has any power to grant or to deny admission to the bar. That power is vested in the California Supreme Court alone. *In re Lacey,* 11 Cal.2d 699, 701, 81 P.2d 935, 936; *Preston v. State Bar of California,* 28 Cal.2d 643, 650, 171 P.2d 435, 438-439.

The Committee of Bar Examiners (authorized by statute to be established by and serve for the Board of Governors) constitutes under California law merely an instrumentality or "arm" of the Supreme Court "for the purpose of assisting in matters of admission * * *". Id. It is authorized to administer the requirements for admission, to examine all applicants, and to certify those whom it finds to have fulfilled the requirements for admission. Cal. Bus. & Prof. Code, §6046. But certification or refusal by it to certify is legally simply a recommendation to the Court. "The recommenda-

tion • • • is advisory only • • •"; the Court "has the inherent power and authority to admit an applicant to practice law • • • despite an unfavorable report • • •"; "the final determination in all these matters rests with this court" (California Supreme Court); and "its powers in that regard are plenary". *Lacey* and *Preston*, supra, ibid.

Statutory provision exists that "[a]ny person refused certification [by the Committee] may have the action • • • reviewed by the Supreme Court, in accordance with the procedure prescribed by the court". Cal. Bus. & Prof. Code, §6066. The Court has made the refusal of the Committee to certify an applicant procedurally subject to consideration by it through the filing of a petition for review. Rule 59, Rules of Practice and Procedure of the Supreme Court of California (36 Cal.2d 43). It is to be particularly noted that what is involved in the Court's dealing with such situations is, as *Konigsberg v. State Bar of California*, 353 U.S. 252, 254, 77 S.Ct. 722, 724, 1 L.Ed.2d 810, has recognized, not the exercise of restricted appellate function but of original jurisdictional power.

The significance of this is that under California law a refusal of certification by the Committee is not a power of deprivation. Only if the Court expressly or impliedly approves the Committee's refusal to certify so as to make this the basis or allow it to have the effect of a denial of admission can the Committee's actions of examination and refusal to certify come to be a fixative status and have the stature of a deprivation.

Thus the situation here is not a matter of exhausting state remedies in respect to an alleged federal right, but of there being no basis for any alleged federal right to exist as to the Committee's actions until the California Supreme Court in the exercise of its original power over admissions has allowed these actions to serve as a deprivation. The holding of *Monroe v. Pape*, 365 U.S. 167, 183, 81 S.Ct. 473, 482, 5 L.Ed.2d 492, and *McNeese v. Board of Education*, 373 U.S. 667, 671-672, 83 S.Ct. 1432, 1435, 10 L.Ed.2d 622, that it is not necessary to exhaust state remedies before a suit can be instituted under the Civil Rights Act, is therefore without application. Whatever may be the scope of the right to sue granted by 42 U.S.C. §1983, it extends in any event only to "the *deprivation* of any rights, privileges, or immunities

secured by the Constitution and laws [of the United States]". (Emphasis added).

Hence—repeating—even if the form of examinations given by the Committee, or their scope and difficulty in allegedly exceeding the educational qualifications prescribed for taking them, or the Committee's grading of them, had been actions which abstractly could be violative of due process or unequal protection, this could not give rise to any right of federal remediability until it had been made the basis of a deprivation of admission. And such a deprivation could not legally occur until the California Supreme Court had expressly or impliedly approved the Committee's refusal to certify and thus had allowed the Committee's actions to become the basis of denial of admission.

Appellant contends, however, that it would be useless to ask the California Supreme Court to give consideration to the Committee's refusal of certification as a challenge to the Committee's examination actions. Even if this were true practicably, it would not enable the condition to be escaped that legally the Committee's action is without power to effect deprivation and that it can only come to have that consequence if it is given approval by the California Supreme Court and so allowed to become the basis of denial of admission.

We might add, however, that we can see nothing in the expressions of the California Supreme Court to indicate that that Court would not engage in due consideration of an attack upon the actions of the Committee for infirmities of substance which, if given approval and so allowed to effect denial of admission, would cause an applicant to be deprived of admission on violation of the Due Process or Equal Protection Clause of the Fourteenth Amendment.

The Court has stated in effect that it will not engage in a regrading of examination papers—as no federal court is likely to do either. It said in *Staley v. State Bar*, 17 Cal.2d 119, 121, 109 P.2d 667, that "Inability to pass the examinations, which are successfully passed by other applicants, will, of course, not be inquired into by the court". But it added that "if any dissatisfied applicant can show that he was denied passage of the state bar examinations through fraud, imposition or collusion, this court is willing to listen to his complaint".

While it is of no importance here, we think there can be no reason to doubt that if, such overwhelming numbers of those taking the examinations regularly failed to pass as reasonably to imply, either that examinations were being given of such scope or difficulty as to be outside the range of the educational prescriptions which have been made the basis of the right to take the examination, or that the Committee was engaging in improper grading in order generally to restrict admissions, the California Supreme Court would engage in appropriate inquiry.

We have held (1) that the contentions made by appellant do not on their facts present questions of constitutional substance, and (2) that even if any such substance had been involved, no deprivation of rights in relation thereto could exist as a basis for seeking federal relief until the California Supreme Court had given the Committee's actions effect as a denial of admission. In view of the basic aspects of this disposition, it is not necessary to deal with the other contentions urged by appellees for affirmance. Some of these have been the subject of express or implied holding in *Clark v. State of Washington,* 9 Cir., 366 F.2d 678. One of them —whether improper denial of admission to the bar or improper action of disbarment on the part of a State is at all (even injunctively only) subject to remedy under the Civil Rights Act or whether it is reachable solely through petition for certiorari to the United States Supreme Court from the state court order—is referred to in *Clark,* 366 F.2d at 680-681, but not expressly answered, as it need not be here.

Affirmed.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 11-27-67—255

APPENDIX II

Points in Answer to Opinion of Court Below

ASSUMPTION OF RIGHT

The opinion, on page 3, states that "California has the right" to give subjective (arbitrary) type tests. Petitioner has examined the pertinent provisions of the State Bar Act (B & P Code, Sections 6001 et seq.) and cannot find where any such right is stated. Therefore, it is an assumed right, which is the main controversy in this case. Petitioner contends California (meaning the State Bar) has no such right.

SOURCE OF AUTHORITY

The court below, on pages 2 and 3, cites the American Bar Association as authority for assuming the right to give essay (subjective) type examinations. This court, and the one below, knows that American Bar Association opinions have no legal force. Petitioner quotes federal and state statutes and the opinions of the court as his authority, and these do have legal force.

The court below also establishes the appropriateness of essay (subjective) examinations by pointing out that they are used in most law schools. This may be true. However, the court below makes no showing that law schools and integrated state bars are in a comparable position, which they are not, because they have different functions, nor is there any showing that law schools are necessarily Democratic in their examinations.

RATIONAL CONNECTION

The court below, at the middle of page three in its opinion, makes the point that there is a "rational" connection between an essay (subjective) type examination and establishing qualifications. Petitioner agrees that the essay (subjective) type examination has a rational connection in the sense that it is one way of testing. However, it is nonetheless an arbitrary way, and arbitrary examinations have been forbidden by this court. Furthermore, your petitioner is prepared, when and if he gets to trial, to put on the evidence of psychologists showing that essay (subjective) type testing is regarded as one

of the most unreliable forms of testing.

CONTROL OF COMPETITION

The court below states in its opinion on page 4 that an allegation of control of competition can only have basis in (1) dishonest grading, or (2) if the bounds of the examination are outside "the educational prescriptions which the California statute has made the basis for the right to take the examination."

It is impossible to prove the former. Judgment may be good or bad, but it can never be dishonest. As to the latter, petitioner points out that the United States Attorney General used statistics to support his contention in United States vs. Louisiana, supra, that Negroes were being systematically discriminated against in voting rights. The only difference in that case and the instant case is that color was the basis for discrimination in the former, while numbers is the basis for discrimination in the latter.

Petitioner's statistics also suggest that the bounds of educational prescription mentioned by the court below are obviously being exceeded, since less than half of examinees are passing.

HIGH STANDARDS

The court below in its opinion on page 5 said California (meaning the State Bar) is entitled to demand higher standards than other states. Petitioner contends there is no standard in California, but rather there is a system of subjective selectivity. Examinees are graded on the basis of what the reader thinks about them at the time he reads their examination papers. When the decision rests purely with the will of the grader, it can hardly be called a standard examination, because it defies measurement by anyone else but the grader.

EXHIBIT A

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

Jerry D. Chaney
1800 W. Lincoln Ave., Apt. 227
Anaheim, Calif. 92801,
Applicant

Ex parte Motion

The above named applicant moves that this court admit him to active membership in the State Bar of California and that the clerk of this court be ordered to issue to him a license to practice law in the State of California.

Jerry D. Chaney
Jerry D. Chaney
Applicant

AFFIDAVIT IN SUPPORT OF MOTION
FOR ADMITTANCE TO STATE BAR OF
CALIFORNIA AND FOR LICENSE TO
PRACTICE LAW

State of California)
) ss
County of Orange)

I, Jerry D. Chaney, certify, under penalty of perjury, that the following is true and correct:

1. I am a citizen of the United States.

2. I am over the age of 21.

3. I have never been arrested or charged with any crime other than minor traffic violations, and I enjoy a good reputation (see attached list of references).

4. I have been a resident of the State of California for over eight years.

5. I have successfully completed over two years of undergraduate college education and have completed three years of legal education.

6. I hold a bachelor of science degree from the American University in Washington, D. C., and a bachelor of laws degree from the same university.

7. I registered with the Committee of the Bar Examiners of the State Bar of California as a law student on May 2, 1960, duly paying my regular and late filing fees. I was assigned registration number LR-5590.

8. I took the examinations given by the State Bar of California in the fall of 1960, spring of 1961, fall of 1965 and spring of 1966. I failed each of these examinations.

Jerry D. Chaney
Jerry D. Chaney

Jan 2 1968
Date

LIST OF REFERENCES

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EXHIBIT B

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San Francisco, California

5 January 1968

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Mr. Jerry D. Chaney
1800 West Lincoln Ave., Apt. 227
Anaheim, Calif. 92801

Dear Sir:

At the request of the court we are returning herewith, unfiled, the original and nine copies of a document as presented by you and titled "Ex Parte Motion."

From a reading of the document it appears that your proper remedy is a petition for a writ of review.

Your attention is invited to the provisions of Rule 59(b), California Rules of Court, in which the procedure to be followed is set forth. This includes service of three copies on the respondent of the petition sought to be filed.

As this remedy is civil, by statute, there is required the payment of a filing fee in the amount of $50.00. There is no provision for waiver of the requisite fee.

Very truly yours,

William I. Sullivan
Clerk of the Supreme Court

By: G. E. Bishel
G. E. Bishel
Chief Deputy

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IN THE

Supreme Court of the United States

October Term 1967

No. 1140

JERRY D. CHANEY,

Petitioner,

vs.

THE STATE BAR OF CALIFORNIA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION

Pursuant to Rule 24 of the Rules of the Supreme Court, respondents The State Bar of California, John A. Sutro, J. N. DeMeo, A. Stevens Halsted, Jr., Peter J. Crosby, Jr. and David B. Heyler, Jr. oppose the issuance of a writ of certiorari in the above entitled case for the reasons set forth in this brief.

JURISDICTION AND STATUTES INVOLVED

Petitioner correctly states the basis of this Court's jurisdiction and correctly cites the constitutional and statutory provisions applicable to the questions raised by this petition, except in the following particulars:

1. Petitioner's quotation of Section 6046 of the California Business and Professions Code is incomplete, the full text being as follows:

§ *6046.* "The board may establish an examining committee having the power:

"(a) To examine all applicants for admission to practice law.

"(b) To administer the requirements for admission to practice.

"(c) To certify to the Supreme Court for admission those applicants who fulfill the requirements provided in this chapter."

2. Petitioner does not cite nor set forth Sections 6010, 6011, 6060 and 6066 of the California Business and Professions Code, which provide in pertinent part as follows:

§ *6010.* "The State Bar is governed by a board known as the board of governors of the State Bar. The board has the powers and duties conferred by this chapter."

§ *6011.* "The board consists of fifteen members."

§ *6060.* "To be certified to the Supreme Court for admission and a license to practice law a person . . . shall:

". . .

"(b) Have passed a final bar examination given by the examining committee."

". . .

§ *6066*. "Any person refused certification to the Supreme Court for admission to practice may have the action of the board, or of any committee authorized by the board to make a determination on its behalf, pursuant to the provisions of this chapter, reviewed by the Supreme Court, in accordance with the procedure prescribed by the court."

3. Petitioner does not cite nor set forth Rule 59(b) of the Rules of Practice and Procedure of the Supreme Court of California (36 Cal.2d 43), which provides in pertinent part as follows:

"Rule 59.

" . . .

"(b) A petition to the Supreme Court to review any other action of the Board of Governors of The State Bar, or of any committee appointed by it and authorized to make a determination pursuant to the provisions of the State Bar Act, shall be filed within 60 days after written notice of the action complained of is mailed, postage prepaid, to the petitioner. . . . The petition shall be verified, shall state the grounds relied upon and shall be accompanied by petitioner's brief and proof of service on the Board of Governors of 3 copies of the petition and the brief. . . ."

STATEMENT OF THE CASE

Petitioner's statement of the case is correct (Petition, pp. 7-8).

ARGUMENT

The petition purports to raise 10 separate questions, but only five are argued. Respondents will deal with these five questions as follows:

1. Did petitioner suffer a "deprivation" of any rights, privileges or immunities secured by the Constitution or laws of the United States? (Question 5, Petition, p. 3)

2. Does the use of an essay examination in testing the qualification of applicants for admission to a state bar raise any substantial federal question? (Questions 1-4, Petition, pp. 2-3)

The remaining questions not argued by petitioner each constitute an independent ground for sustaining the judgment below and will be discussed briefly herein.

I

PETITIONER HAS SUFFERED NO "DEPRIVATION" COGNIZABLE UNDER THE CIVIL RIGHTS ACT. (Question 5, Petition, p. 3)

The Court of Appeals concluded that petitioner had suffered no "deprivation" of any right, privilege or immunity secured by the Constitution or laws of the United States within the plain language of 42 U.S.C. § 1983. The Court reasoned that because certification by the Committee of Bar Examiners is purely advisory and the California Supreme Court alone has jurisdiction to admit or refuse admission to the State Bar, a "deprivation" could occur only through the action of the California Supreme Court (386 F.2d 962, 966-7).

Petitioner argued below and contends here that the refusal of the State Bar to certify an applicant is tantamount to Supreme Court refusal because of that court's refusal to review examination results. As the Court of Appeals held, the argument not only misses the point but is without factual basis. The California Supreme Court stated in *Staley v. State Bar*, 17 Cal.2d 119, 121; 109 P.2d 667 (1941) that: "Inability to pass the examinations, which are successfully passed by other applicants, will, of course, not be inquired into by the court." However, it went on to state that "if any dissatisfied applicant can show that he was denied passage of the state bar examinations through fraud, imposition or coercion . . . , this court will be willing to listen to his complaint." Thus, an attack upon the examination on constitutional grounds would certainly be heard by the Supreme Court of California.

Petitioner attempts to bolster his argument here by referring to the California Supreme Court's refusal to file his "Ex Parte Motion" for admission after the decision by the Court of Appeals (Petition, Exs. A & B). The letter from the clerk of the California Supreme Court upon which petitioner relies shows on its face, however, that the court did not refuse to consider petitioner's application. Rather, the clerk courteously called petitioner's attention to the correct procedure for presenting his contentions for decision by the court.

In point of fact, petitioner had waived his right to seek review in the California Supreme Court by his failure to proceed within the 60-day time limit specified by Rule 59(b) of the Rules of Procedure and Practice of the California Supreme Court. This does not alter the fact

that until the Supreme Court has acted in his case, petitioner can suffer no "deprivation" within the cognizance of the Civil Rights Act.

The conflict of decision urged by petitioner with *Monroe v. Pape,* 365 U.S. 167; 81 S.Ct. 978; 5 L.Ed. 2d 492 (1961) and *McNeese v. Board of Education,* 373 U.S. 668; 83 S.Ct. 1433; 10 L.Ed. 2d 622 (1963), is without substance. The holding of *Monroe* was that the mere fact that a state by its Constitution and laws outlawed unreasonable searches and seizure was no barrier to a suit under the Civil Rights Act based upon unreasonable search and seizure. In *McNeese,* this Court reversed the lower court holdings that plaintiffs must exhaust an administrative remedy provided under state law before maintaining a Civil Rights Act suit, emphasizing the "tenuous protection" afforded by an administrative remedy of doubtful adequacy accompanied by a clearly inadequate sanction.

As pointed out by the Court of Appeals those cases have no application to the instant case because there has been no "deprivation" of any kind until and unless the California Supreme Court expressly or impliedly approved the refusal to certify petitioner for admission to practice (386 F.2d 962, 966-7). Moreover, the provision of a direct and immediate review by the California Supreme Court of a refusal to certify is not a "tenuous" remedy and ought not to be disregarded. As this Court has observed, lawyers are subject to the "autonomous control" of the state and "state courts should be given the opportunity to regulate and vindicate that control" *Theard v. United States,* 354 U.S. 278, 281; 77 S.Ct. 1274, 1 L.Ed. 2d 1342 (1957).

II

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED. (Questions 1, 2, 3 and 4, Petition, pp. 2-3)

Upon analysis the petition raises only two arguments in support of petitioner's position that a substantial federal question is presented. First, it is contended that the essay format used in the California bar examinations is necessarily arbitrary in result and, thereby, those who fail such examinations are denied due process of law (Questions 1, 2 and 3, Petition, p. 2). Second, it is contended that the sole function of the bar examination is to restrict competition among attorneys in California, thus unconstitutionally discriminating against unsuccessful applicants (Question 4, Petition, pp. 2-3). Neither of these arguments have any substance.

Both arguments are based upon a claim of conflict with this court's decision in *Louisiana v. United States,* 380 U.S. 145, 85 S.Ct. 817, 13 L.Ed. 2d 709 (1965). There Louisiana adopted a requirement that persons seeking to register to vote demonstrate to the satisfaction of the registrar an understanding and reasonable interpretation of the state or federal constitutions. Whether one passed this "interpretation test" was subject to the uncontrolled discretion of the registrar. The record abounded with evidence that the test was designed and utilized for the express purpose of excluding Negroes from the voting rolls. In brief, the test was being systematically used to deprive a class of citizens of a constitutional right without regard for their qualification to vote. The decision did not purport to prohibit all types of essay examinations and certainly did not hold that

all lawyers must be admitted to practice regardless of their qualifications.

Schware v. Board of Bar Examiners of State of New Mexico, 353 U.S. 232, 238-239, 77 Sup.Ct. 752, 1 L.Ed. 2d 796 (1957), defines the extent of federal concern as to the right to be admitted to practice law in a state:

> "A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment. * * * A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law. * * * Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory."

Louisiana v. United States, supra, does not hold to the contrary.

A. An Essay Type Bar Examination Is a Rational Method of Testing Proficiency at the Law.

The Court of Appeals held:

> "Within the recognition contained in *Schware* of the right of a State to require high standards of relevant qualification for admission to its bar, and in relation to the condition thereof that any such required qualification must however have 'a ra-

tional connection with the applicant's fitness or capacity to practice law', we are unable to see any possible federal question in the fact of the use by California of the essay-type examination as such. To us it seems patent on its face that California has the right to allow its Committee of Bar Examiners to use such a type of examination in demonstration by those seeking admission to its bar, as a qualification standard, that they have the capacity to analyze general legal situations and to make application thereto of such general legal knowledge as can be expected to be possessed by the graduates of accredited law schools. The existence of this qualification certainly has a rational connection with the capacity to practice law, for it inherently is the primary basis of general legal service. And of course there also is involved in such an essay examination an indication as to the possession or lack of knowledge in the legal fields to which the questions relate."

As the Court of Appeals noted:

"Appellant does not purport to claim . . . that there was no basis for the Committee of Bar Examiners' finding that he failed to pass the examinations taken by him. Nor does he purport to claim that the Committee was without basis to find that those whom it certified to the Supreme Court for admission had passed the examinations so as to involve invidiously discriminatory action with respect to him." 386 F.2d 962, 964

Thus, petitioner's claim of a substantial federal question is restricted to the argument that (1) an essay type bar

examination is not a rational method of testing his proficiency at the law, and (2) the California bar examinations are "invidiously discriminatory" because they have been used to restrict competition among lawyers. Neither argument is supportable.

The error underlying petitioner's attack on this holding is in the unfounded conclusion that because the California bar examination uses an essay format, the evaluation thereof is necessarily "based wholly on the grader's subjective (thus arbitrary) view of how well . . . the (examinee) could 'reason logically in a lawyer-like manner to sound conclusions. . . .'" In actuality, an essay discussing the application of legal principles to a given set of facts is capable of objective evaluation. As observed by the Court of Appeals, the essay type of examination is the type recommended by the American Bar Association and generally employed in the law schools of the country. Most lawyers would concede the superiority of essay type examinations in testing proficiency at the law. But whether or not they are in fact superior, they are a reasonable and rational method for such testing and do not violate due process.

B. The California Bar Examinations Are Not Invidiously Discriminatory.

On this point, petitioner claims that the holding of the Court of Appeals conflicts with *Louisiana v. United States*, supra, because:

> "The only difference in that case and the instant case is that color was the basis for discrimination in the former case, while numbers is the basis for

discrimination in the latter." (Petition, Appendix II, p. iii)

The petition further states:

> "Your petitioner maintains the examinations of which he complains achieve nothing other than they reduce the number of successful applicants for admission, and this accomplishment, standing alone, is discriminatory; thus not a proper state purpose." (Petition, p. 12)

These arguments are not well founded either logically or factually.

Obviously, requiring high standards of proficiency at the law of applicants for admission to practice is a proper state purpose. (*Schware v. Board of Bar Examiners of State of New Mexico, supra.*) And insistence upon such high standards will necessarily limit the number of persons admitted to practice. But petitioner avers that "In 30 consecutive bar examinations only 50.7 per cent passed the spring examinations and only 53.5 per cent passed the fall examinations. . . . Only slightly over 42 per cent passed the March 1966 examination." (Record, p. 10) and insists that these figures show that "Each of said examinations was part of a deliberate and invidious scheme of the State Bar . . . to control competition among attorneys of the State" (Record, p. 4). Of course, these figures show no such thing. Standing alone, they indicate only that California is exercising its right to establish and maintain high standards of proficiency at the law.

The Court of Appeals recognized that a claim for relief might be stated if it was shown that in order to

restrict competition the Committee of Bar Examiners (1) has been engaging is dishonest grading, or (2) has been giving examinations of such scope or difficulty as to be outside the bounds of educational prescriptions which the California Statute has made the basis for the right to take the examination.

Petitioner has never contended that such conditions exist. His allegation that the bar examinations have been used as part of a "deliberate and invidious scheme of the State Bar of California to control competition among attorneys of the state" (Record, p. 4), is a mere conclusion of law which is not entitled to weight *Saier v. State Bar of Michigan,* 293 F.2d 756, 761 (6th Cir. 1961). Petitioner does not contend that the Committee of Bar Examiners had engaged in dishonest grading (Petition, p. 4). Even if petitioner had alleged that the bar exam exceeded the permissible scope of difficulty, in view of the fact that approximately 50% of all applicants have passed the last 30 examinations such an allegation would be entitled to no weight. Petitioner alleged no facts showing or tending to show discrimination except on the basis of proficiency at the law.

III

THE STATE BAR IS NOT A "PERSON" WITHIN THE MEANING OF THE CIVIL RIGHTS ACT.

One of the grounds for dismissal in the District Court was that the State Bar of California is not a "person" within the meaning of the Civil Rights Act, and hence not subject to suit under that statute. This question was not reached in the opinion of the Court of Appeals. How-

ever, the District Court was correct in holding that the State Bar of California is not a "person" within the meaning of the Civil Rights Act.

In enacting the Civil Rights Act, Congress decided not to impose obligations upon a "mere instrumentality for the administration of state law." *Monroe v. Pape,* 365 U.S. 167, 190; 81 S.Ct. 473; 5 L.Ed. 2d 492 (1961). It has been expressly held that an integrated state bar association is an agency of the state to which this construction of the statute is applicable. *Clark v. State of Washington,* 366 F.2d 678, 681 (9th Cir. 1966).

Petitioner's only argument to the contrary has been that the governmental instrument exception should not apply because the State Bar is not a tax supported agency (Record, p. 56; Appellant's Brief, p. 22). This attempted distinction is not material to the purpose of the legislative exemption for governmental instrumentalities. Whether supported by taxes from the general fund, from special funds, by special assessments, or by dues exacted from its members to finance its public functions, it remains the unalterable fact that the State Bar of California is an instrumentality for the administration of state law.

IV

THE STATE BAR AND ITS OFFICERS HAVE QUASI-JUDICIAL IMMUNITY FROM SUIT UNDER THE CIVIL RIGHTS ACT. (Question 9, Petition, p. 3)

Judicial and quasi-judicial officers are immune from suit under the Civil Rights Act for acts committed in the performance of an integral part of the judicial process.

This point was not reached by either the Court of Appeals or the District Court but is an independent ground sustaining the judgment below.

Quasi-judicial immunity has been recognized in a wide variety of situations. Specifically it has been held that such immunity applies to officers of an integrated state bar association with respect to the discharge of their functions in connection with the qualification and disqualification of attorneys. *Clark v. State of Washington, supra,* 681; *Rhodes v. Meyer,* 334 F.2d 709 (8th Cir. 1964), cert.den. 379 U.S. 915 (1964); *Campbell v. Washington State Bar Assoc.,* 263 F.Supp. 991 (W.D. Wash. 1967).

Petitioner has argued that because no judicial authority has been delegated to the State Bar or its Committee of Bar Examiners, it cannot have quasi-judicial immunity (Record, p. 55, Appellant's Brief, p. 23). The defect of this argument is the assumption that it is necessary for an act to be an exercise of judicial authority to be entitled to quasi-judicial immunity. To the contrary, any act which is an integral part of the judicial process, necessary for the courts to carry out their judicial functions, is protected by quasi-judicial immunity. Thus, it has been held that quasi-judicial immunity applies to the acts of grand juries and their foremen, *Cawley v. Warren,* 216 F.2d 74 (7th Cir. 1954); *Lyons v. Baker,* 180 F.2d 893 (5th Cir. 1950), cert.den. 340 U.S. 828 (1950) and to doctors appointed by the court to inquire into a person's mental condition for the purpose of advising the court thereon. *Duzynski v. Nosal,* 324 F.2d 924 (7th Cir. 1963); *Bartlett v. Weimer,* 268 F.2d 860 (7th Cir.

1959), cert.den. 361 U.S. 938 (1960). In none of these cases did the acts in question involve an exercise of judicial authority.

V

AN INJUNCTION AGAINST RESPONDENTS COULD NOT HAVE BEEN EFFECTIVE TO SECURE THE RELIEF SOUGHT. (Question 10, Petition, p. 3).

In view of the paramount authority of the California Supreme Court with regard to admission to the State Bar, an injunction granting relief along the lines sought by petitioner would have to be enforceable against the California Supreme Court. The District Court, however, had no power to issue such an injunction. *Clark v. State of Washington, supra,* 681-682; *Campbell v. Washington State Bar Assoc., supra.*

VI

THE MATTERS COMPLAINED OF ARE REVIEWABLE BY THIS COURT ONLY ON A PETITION FOR CERTIORARI AFTER REVIEW IN THE CALIFORNIA SUPREME COURT (Question 6, Petition, p. 3).

The District Court's judgment of dismissal was in part based on the conclusion that the matters of which petitioner complains are reviewable only by the California Supreme Court and thereafter by this Court on petition for certiorari. This decision was correct, in light of the recent decisions of this Court or a growing number of cases from the lower Federal courts.

The origin of this rule is this Court's discussion of the diversion of constitutional authority between the state and Federal courts with respect to the regulation of attorneys in *Theard v. United States,* 354 U.S. 278; 77 S.Ct. 1274, 1 L.Ed.2d 1342 (1957). The court there stated:

> "It is not for this Court, except within the narrow limits for review open to this Court, as recently canvassed in *Konigsberg v. California,* 353 U.S. 252, and *Schware v. Board of Bar Examiners,* 353 U.S. 232, to sit in judgment on Louisiana disbarments, and we are not in any event sitting in review of the Louisiana judgment. While a lawyer is admitted into a federal court by way of a state court, he is not automatically sent out of the federal court by the same route. *The two judicial systems of courts, the state judicatures and the federal judiciary, have autonomous control over the conduct of their officers, among whom, in the present context, lawyers are included . . . .*" 354 U.S. 278, 281 (Emphasis supplied)

The teaching of *Theard* was followed in *Gately v. Sutton,* 310 F.2d 107 (10th Cir. 1962), an action in which it was alleged that a disbarment proceeding in the Supreme Court of Colorado created a cause of action under the Civil Rights Act.

> " 'The federal courts do not have jurisdiction to review an order of the Colorado Court disbarring an attorney in that state for personal and professional misconduct. * * * The limits of [federal] review * * * are violations, in the course of disbar-

ment proceedings, of the due process or equal protection clauses of the Fourteenth Amendment, and *a petition for a writ of certiorari to the Supreme Court of the United States is the only method by which review may be had.*'" 310 F.2d 107, 108 (emphasis supplied, citations omitted)

See also: *Jones v. Hulse,* 267 F.Supp. 37, 39 (E.D. Mo. 1967);

Lenske v. Sercomb, 266 F.Supp. 609, 612 (D.Ore. 1967).

Clark v. State of Washington, 366 F.2d 678, 680-681 (9th Cir. 1966);

Cf. Wright v. McMann, 257 F. Supp. 739, 746 (N.D.N.Y. 1966);

United States ex rel Wakely v. Commonwealth of Pennsylvania, 247 F.Supp. 7 (E.D.Pa. 1965).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

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Jerry D. Chaney,

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vs.

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Petition for Rehearing of Order Denying Certiorari And Application to Suspend the Order of Denial of Certiorari

---

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---

INTRODUCTION

Jerry D. Chaney, your petitioner, respectfully requests that this court grant rehearing of its order dated April 8, 1968, which denied certiorari, and that the court now grant certiorari.

REASONS FOR GRANTING PETITION

Petitioner requests rehearing of his petition for writ of certiorari for the following reasons:

1. After petitioner had filed his original petition for writ of certiorari and prior to this court's denial of same, the respondents, in their brief in opposition to granting certiorari, made misleading statements of fact which may have influenced the court's decision.

2. Petitioner, in his original petition for writ of certiorari, inadvertently failed to raise one question which he should have raised, although he did raise it in his complaint to the district court (Record, page 3).

I

MISLEADING STATEMENTS

A. On page 5 of respondents' brief in opposition to granting certiorari, respondents allege that it was the clerk of the California Supreme Court who rejected petitioner's Ex Parte Motion for admittance to the practice of law.

Respondents failed to mention that the clerk acted "at the request of the court" in returning petitioner's motion to him unfiled (See Exhibit B in petition for writ of certiorari).

The action of the court in directing the clerk to return the motion (which, incidentally, did not name a respondent and was not intended as a petition under Rule 59 (b) of Rules of Procedure and Practice of the California Supreme Court) had all the force and effect of a denial of the motion. It ended the matter. It proved what petitioner has contended: that he cannot gain admittance any other way than through certification to the California Supreme Court by the State Bar. There is no other means. Petitioner has been effectively blocked in his attempt to pursue the occupation for which he studied for six years at great personal expense and sacrifice of other opportunities. Because of respondents' failure to certify him, petitioner, in fact, lost his job as a law clerk in a leading law firm in the community where he lived, was

forced to move to another city to find other work, and is no longer associated with the practice of law in any manner.

Respondents make the point that petitioner could have sought his remedy under Rule 59 (b) (Respondents' Brief in Opposition, page 5-6). Petitioner agrees. But petitioner was not precluded from electing to seek the federal remedy, which is a separate remedy, independent of the state remedy, according to the explicit holdings of this court (Record, page 46). Petitioner sought the federal remedy because it was designed specially by the United States Congress to protect the private individual from infringement on his constitutional rights by a person or persons acting under color of law.

For this court to sustain respondents' claim that petitioner suffered no deprivation under 42 USC, Section 1983 (Civil Rights Act) is to (1) frustrate the intent of the United States

Congress; (2) ignore reality; (3) ignore holdings of this court in related cases; and (4) discriminately bar this petitioner from obtaining justice.

B. On page 7-8 of respondents' brief in opposition, the respondents prejudically implied that petitioner is attempting to abolish all requirements for qualification to practice law. Nothing can be further from the truth. What he is attempting to do is establish an ascertainable standard.

C. On page 9-10 of respondents' brief in opposition, it is said that petitioner claims an essay type examination is not a rational method of testing proficiency of law. This is an outright twisting of petitioner's contention. He has never argued that the essay test is not rational. In fact, he has agreed that the essay test is rational (see page ii of Appendix II, Petitioner's petition for writ of certiorari).

However, he does not agree that simply because the test is rational (meaning sensible,

according to Webster's Collegiate Dictionary), it is necessarily constitutional. If constitutionality depended solely on rationality, we would be led to even more absurd results than have already been reached. For instance, if Congress decided there was a need to regulate population growth, a rational way of doing it would be to require sterilization of all children after the second child in each family. It would be sensible, in that the plan would definitely tend to accomplish what the Congress wanted. But would it be constitutional? Petitioner, with some trepidation after hearing some of the argument in the instant case -- hopes not.

D. Respondents further claim on page 10 of their brief in opposition that "most lawyers would concede the superiority of essay type examinations in testing proficiency at the law." Petitioner is a lawyer and he does not concede; nor has a number of other attorneys who he has talked to; nor do the psychologists of this state, who are much more intimately qualified to speak on the merits of one

testing method over another. But whether essay tests are or are not superior is a matter of no significance. Required sterilization undoubtedly would be superior to voluntary birth control. But forced sterilization of children merely because of the order of their birth would be unconstitutional, and so is arbitrary grading -- no matter how superior -- when dealing with a constitutional right.

II

ADDITIONAL QUESTION

Petitioner inadvertently failed to raise the following important question in his original petition for writ of certiorari:

> Whether the State Bar of California, in the giving of an examination to determine if an applicant meets minimum qualifications to practice law, can ask questions which are so vague or capricious that they defy answering with any degree of certainty?

As petitioner contended in his complaint to the district court (Record, page 3), "each of the said examinations (he took) was vague, indefinite, arbitrary and capricious." Indeed, the questions were, for the most part, so vague and indefinite that one could have reasonably discussed an entire field of law in order to fully answer the questions.

To illustrate: Question No. 15 in the March 2, 1966, examination (which petitioner took) stated a series of financial dealings of husband and wife and then said, "Discuss sources to which the judgment creditor may look for satisfaction, and defensive measures and contentions available to H & W. Answer according to California law."

This question opened the door to almost unlimited discussion. A judgment creditor may look to any source he wants, although some of them might not produce anything for him. Does the question call for a discussion of likely sources, or does it call for a complete discussion of all community property laws? The same question could be asked about the

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defensive measures and contentions. Was the examinee expected to discuss all possible defensive measures and contentions? Or was he supposed to discuss only those likely to be considered valid by the court? One does not know. The examinees had to guess at what the grader wanted and try to cover as much as they could in the alloted time of 55 minutes. Such a shot-in-the-dark type of question can hardly be called "fair."

The end result of so vague an examination is that the grader is not required to look for specific answers to specific questions, but may look over the answer generally, pick the ones that happen to satisfy him, and fail the rest, at his whim.

As a final point, respondents say it cannot be contended that grading was unfair simply because some examinees were failed (Respondents' brief in opposition, page 12.) Conversely, neither can it be contended that a showing of honesty on its face is made when some examinees were passed. It is self-evident that, in an examination as equivocal

as this type, the grader is in a position to fail any examinee he wishes to fail, or to fail as many examinees as he wishes to fail; or he can pass anyone or any number that he wishes to pass, for whatever reason he may have. He (the grader) is in complete control of the outcome.

CONCLUSION

In view of the many thousands of potential bar examinees who would be affected by the decision in this case, as well as the countless millions who would be affected by an answer to Question No. 2 in petitioner's petition for writ of certiorari, petitioner urges this court to grant certiorari, so that a full and complete hearing can be had. Petitioner makes this plea in the earnest belief that the essence of democracy and government of law is at stake.

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_____

Appearing in Propria Personna

CERTIFICATE OF GOOD FAITH

Pursuant to Rule 58, I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and is restricted to the grounds specified in paragraph 2.

_____

APPLICATION TO SUSPEND THE ORDER

OF DENIAL OF CERTIORARI

Petitioner in the herein entitled action hereby requests the court to direct an order to the United States Court of Appeals for the Ninth Circuit, suspending denial of the petition for writ of certiorari dated April 8, 1968, in the herein entitled action, pending outcome of the petition for rehearing.

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Dated